IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Saghar Mirfendereski,	:	
Plaintiff,	:	Case No. 2:10-cv-306
v.	:	JUDGE SARGUS
Prep Academy Schools, et al.,	:	
Defendants.	:	

ORDER

The parties to this Fair Debt Collection Practices Act case have reached an impasse with respect to the production of certain documents requested by the plaintiff during discovery. After a telephone conference with the Court at which various aspects of the matters at issue were discussed, and at the Court's suggestion, plaintiff filed a motion to compel discovery. Defendant Rakestraw responded as directed by the Court. For the following reasons, the motion to compel will be granted as set forth below.

I. Discussion

Although a number of different discovery-related issues were discussed during the telephone conference, the issue which prompted the motion to compel deals with plaintiff's request for letters sent by Mr. Rakestraw from January 1, 2007 to December 31, 2009 to persons who allegedly owed a debt to any individual or entity which Mr. Rakestraw (who is an attorney) represented. The purpose of this request was to elicit evidence that Mr. Rakestraw is a "debt collector" as defined in 15 U.S.C. §1692a(6), which provides that a debt collector includes a person who "regularly collects or attempt to collect ... debts owed or due or asserted to be owed or due another." Under this

provision, attorneys may be considered to be debt collectors if they regularly engage in debt collection activities, even if those activities consist of litigation. See Heintz v. Jenkins, 514 U.S. 291 (1995). However, as with any person alleged to be a debt collector, the plaintiff in this type of case must prove that the defendant "regularly" engages in debt collection activity, and this proof must consist of evidence that the person "must have more than an 'occasional' involvement with debt collection activities ...." Schroyer v. Frankel, 197 F.3d 1170, 1174 (6th Cir. 1999). In the context of an attorney who is alleged to be a debt collector, the plaintiff must show that "the attorney ... collects debts as a matter of course for [his] clients or for some clients, or collects debts as a substantial, but not principal, part of his ... general law practice." Id. at 1176.

Given what plaintiff must show in order to prove that Mr. Rakestraw is a debt collector as defined under the FDCPA, the request for letters which he sent for the purpose of collecting debts owed to another is clearly relevant to a claim or defense in the case, and therefore satisfies the discovery relevance standard contained in Fed.R.Civ.P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ...). Courts have routinely considered matters such as the number of times an attorney has sent out a collection letter as evidence of whether the attorney is a debt collector. See, e.g., Carace v. Lucas, 775 F.Supp. 502, 504-05 (D. Conn. 1990). Thus, the question posed by the motion to compel is not so much the relevance of these documents, but what protections, if any, should accompany their production.

Mr. Rakestraw has argued that it would be an independent violation of the FDCPA to reveal certain information contained in any collection letters which he sent to alleged debtors. He has

not identified any specific provision of the Act or any regulations promulgated under the Act which, in his view, would be violated by the production of these letters, but he may be concerned about the prohibition in 15 U.S.C. §1692c(b) regarding communication with third parties. Section 1692c(b), however, prohibits communications with a third party only "in connection with the collection of a debt," which this would clearly not be, and it allows for an exception with "the express permission of a court of competent jurisdiction ...." As far as regulations are concerned (and the Court addresses this issue because, in the memorandum in opposition, Mr. Rakestraw refers to "regulations set forth under the Fair Debt Collection Practices Act," see Doc. #18, at 1), until the effective date of P.L. 111-203, which appears to have been July 21, 2010, 15 U.S.C. §1592l(d) provided that neither the Federal Trade Commission nor any other agency was permitted to promulgate regulations about debt collection by debt collectors as defined in the FDCPA. The Court is not aware of any regulations promulgated since that date, nor any regulation which might be violated by the production of these letters as part of the discovery in this case.

Notwithstanding the fact that a court order directing Mr. Rakestraw to produce his collection letters would seem to eliminate any question about whether that production might subject him to liability for violating the FDCPA, the Court is required to consider whether the production of debt collection letters without any restriction on their dissemination or use might cause any person to suffer from "annoyance, embarrassment, oppression, or undue burden or expense ...." Fed.R.Civ.P. 26(c)(1). In order to address these concerns, the Court is given broad discretion to fashion an appropriate order governing the discovery in question, including forbidding certain discovery or restricting the discovery to certain matters and not others. See

id. Here, as was discussed during the telephone conference, it may be possible to redact certain information from any collection letters sent by Mr. Rakestraw in order to protect the identity of the recipients of those letters or to shield certain information about the alleged debt from public scrutiny without adversely affecting plaintiff's ability to use the letters as evidence that Mr. Rakestraw did, indeed, regularly collect debts as part of his law practice. The Court will therefore permit Mr. Rakestraw's counsel to make such redactions so long as they do not affect the plaintiff's or the Court's ability to determine if the letters are, in fact, debt collection letters. If any dispute about the nature or propriety of the redactions arises, the Court is willing to conduct an *in camera* review of selected letters in order to resolve that dispute. Further, the Court will restrict the disclosure of the letters, even in redacted form, to the parties and their counsel, and will restrict their use to purposes related to this litigation. No other specific restrictions have been requested by the parties, so the Court will not impose any at this time.

II. Order

Based on the foregoing, plaintiff's motion to compel discovery (#16) is granted. Defendant Rakestraw shall, within fourteen days, fully respond to plaintiff's document request #14. He may, however, redact any personal or sensitive information from the documents produced so long as those redactions do not affect the plaintiff's or the Court's ability to determine if any letter which is produced is a debt collection letter. Further, the documents produced shall be disclosed only to the parties and their counsel, or to the Court in the ordinary course of these proceedings, absent a further order of the Court or an agreement by the parties as to additional disclosures. The documents may not be used for any purpose other than the conduct of this case.

III. Procedure for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge